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JURISDICTIONAL STATEMENT

This original action in prohibition involves the question of whether the Respondent failed to enforce the venue rights of the Relators when Respondent denied Relators' Motions for Transfer of venue, and whether the Alternative Writ of Prohibition entered by this Court on April 19, 2001 shall be made peremptory. This Court has jurisdiction pursuant to Article 5, Section 4.1 of the Missouri Constitution to determine an issue and issue remedial writs.

STATEMENT OF FACTS

On August 28, 1998, Plaintiff Kathy Penny filed her original, one count petition against Defendant Delmar Giles in the Circuit Court of St. Francois County, Missouri, complaining of personal injuries allegedly sustained as a result of a fall from the car of a Ferris wheel operated by Defendant Giles at the St. Francois County Fair in Farmington, Missouri. (A. 1-4). Plaintiff subsequently filed Amended Petitions in the St. Francois county case, naming Defendants Forsythe and Dowis Rides, Inc. and Reithoffer Shows, Inc. as parties. (A. 5-16, ¶ 3). Substantial written and oral discovery was completed in the case.

On or about June 13, 2000, Penny requested a voluntary dismissal of the St. Francois County lawsuit without prejudice. (A. 17-18). On June 20, 2000, Penny re-filed her Petition in the Circuit Court of the City of St. Louis. (A. 19-22). That Petition named only one defendant, Harold Linthicum, an employee of Defendant Giles. (A. 19-22, ¶ 2). Linthicum is a citizen and resident of the State of Arkansas. (A. 19-22, ¶ 2). The allegations against Linthicum were that he operated the Ferris wheel and maintained it on or about the time Penny allegedly was hurt. (A. 19-22, ¶ 6-7). As Linthicum is a non-resident of Missouri, and as he was the sole defendant named in the newly filed St. Louis City case, Plaintiff asserted § 508.010(4) R.S.Mo as a basis for venue in the City of St. Louis.

The following day, on June 21, 2000, Plaintiff requested and was granted leave to amend her Petition to add as defendants Relator Giles and the other defendants from the St. Francois County case, as well as two additional defendants. (A. 23-40).

On or around September 1, 2000, Relators Linthicum and Giles timely filed a Motion To Transfer Venue in the Circuit Court of the City of St. Louis. (A. 41). That Motion was argued on September 25, 2000, following which argument Respondent Judge Michael B. Calvin took the matter under submission. On February 1, 2001, Respondent denied the Motion To Transfer Venue. (A. 46-47).

Relators filed a Petition for Writ of Prohibition in the Missouri Court of Appeals for the Eastern District. (A. 48-64). That Court denied the Application for Joint Petition of Writ of Prohibition on March 23, 2001. (A. 65). On or about April 11, 2001, the Relators filed a Petition for Writ of Prohibition with this Court. (A. 66-87). On April 19, 2001 this Court entered its Order commanding Respondent to vacate his Order denying the Motion To Transfer Venue or show cause, if any, on or before May 21, 2001. (A. 88). On May 17, 2001, a response to this Order to Show Cause was filed on behalf of Respondent.

POINT RELIED ON

I. Relators are entitled to a Writ of Prohibition to compel Respondent to vacate his Order of February 1, 2001 denying Relators' Motion To Transfer Venue and to transfer plaintiff's case to a proper venue, which in this case would be either St. Francois County or Butler County, Missouri. Venue in the Circuit Court of the City of St. Louis is improper under the general venue statute, Section 508.010 RSMo. (1999), in that::

A. No defendant named in this action resides in the City of St. Louis. Relator Harold Linthicum is a resident of the state of Arkansas. Relator Delmar Giles, d/b/a Bluff City Shows, resides in Butler County, Missouri. The remaining named defendants are foreign corporations. Plaintiff's cause of action accrued in St. Francois County, Missouri; and

B. Allowing venue to be determined at the time Plaintiff filed her original Petition against Linthicum, a non-Missouri resident, rather than at the time the motion challenging venue was decided, or after the case was brought against the Defendant challenging venue, has permitted Plaintiff to forum shop in derogation of Defendant Giles' right to defend this action either in the county where it is alleged to have accrued, or in the county of his residence, as provided by statute.

§508.010 RSMo.(1994)

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962)

ARGUMENT

I. INTRODUCTION

This matter presents a straightforward procedural question bearing on Missouri citizens' venue rights: when is venue determined if more than one defendant is named in an action? Missouri's general venue statute, § 508.010 RSMo (1994), is silent on this question, leaving it a matter for this Court's interpretation.

Citing this Court's holding in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. 1994), Respondent determined that venue in this case was fixed at the time Plaintiff filed her original Petition naming a single, nonresident defendant. In *DePaul*, the Court held that venue is determined "as the case stands when ***brought***, not when a motion challenging venue is decided." 870 S.W.2d at 823 (emphasis in original). Since venue was proper when Plaintiff originally filed, Respondent refused to transfer the case even though venue was undeniably *improper* at the time the challenge to venue was being decided. Relators submit that venue should have been decided according to the presence and status of the parties at the time Respondent ruled on the merits of the challenge – that is, when the case was *brought* against the other defendants.

To hold otherwise deprives later-sued defendants like Relator Giles of their right to challenge venue when suit is brought against them in venues distant from their residences and in which no part of the transactions giving rise to the causes of action occurred. It also promotes the kind of forum shopping evidenced by Plaintiff in this and

numerous similar cases involving nonresident defendants. For there can be no mistaking what Plaintiff has done in this case. Fully aware that Relator Giles was a party she eventually intended to join in the action (he is Relator Linthicum's employer, and under *respondeat superior* potentially liable for any negligence of which Linthicum is found liable), Plaintiff took clear advantage of the "rule" fixing venue as of the first filing and filed suit against Linthicum only (a nonresident) so as to establish venue in the City of St. Louis. Failing to join Relator Giles at the first filing simply because he would have defeated venue in the City of St. Louis when she fully intended to (and did) join him ***the very next day*** amounted to the kind of pure trickery the venue statute is intended to prevent.

Fixing venue as of the time the case is brought against the first defendant effectively allows plaintiffs like Penny to engage in a practice Relators have termed "pretensive non-joinder." While not a legal concept in Missouri, "pretensive non-joinder" describes a practice as repugnant to Missouri venue law as that of the recognized concept of pretensive joinder. Where pretensive joinder is the bad faith joining of a party defendant where it is clear that he was joined for the sole purpose of obtaining venue, "pretensive non-joinder" can be seen as the failure initially to join a party solely because he would defeat venue in the chosen forum, when it is clear that the plaintiff intends to (and does) join him once venue is established.

Missouri law prohibits plaintiffs from arbitrarily selecting a forum in derogation of defendants' venue rights by joining parties in bad faith. It should also prohibit plaintiffs from the kind of gamesmanship evidenced in this case. Were it not for the legal loophole

created by the "first filing" rule, Plaintiff would have had no incentive to dismiss the action then pending in St. Francois county where venue was proper and re-file in the City of St. Louis when she discovered that Relator Giles' employee was a nonresident. Relator Giles was a party defendant in the St. Francois county case. The only reason not to name him in the first St. Louis City filing was because he would have defeated venue. Once venue was secure, Plaintiff named him the following day.

Relators submit that determining venue according to the presence and status of all parties at the time venue is challenged – or, put another way, as the case stands when brought against the defendant challenging venue - would further the policies of existing venue law in Missouri, effectuate the intent of the venue statute, and eliminate the manipulative forum shopping evidenced in this case and in those cited below. In this way, all defendants would be afforded the right to challenge venue, not just the defendant originally named. Accordingly, Relators respectfully request that this Court make permanent its Preliminary Writ of Prohibition entered on April 19, 2001.

II. THE STATUTE AT ISSUE

That the propriety of venue is proscribed by statute is not disputed. *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994); *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. banc 1993). The dispute is as to the statute's construction. Respondent's refusal to transfer venue of this case in spite of the fact that venue was clearly improper at the time the challenge was decided was predicated on an interpretation of the statute which found venue to be fixed as of the time the case "is brought." In fact, Respondent acknowledged that it "may appear that plaintiff initially

named only the non-resident defendant in order to obtain venue in the City of St. Louis and intended to bring suit against all of the remaining defendants." (A.) Nevertheless, Respondent felt bound by the timing provision being read into Missouri's general venue statute.

The plain fact is, the statute at issue contains no timing provision whatsoever. § 508.010 RSMo (1994) provides, in its entirety:

508.010. Suits by summons, where brought

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state;

(5) Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the

defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;

(6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state; provided, however, that in any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion of privacy was first published.

As indicated by its title, the statute addresses the question of *where* suits may be brought, according to either the nature of the cause of action or a defendant's residence. Nowhere on its face does it set forth a *time* for fixing venue. Since the statute is silent on the question of when venue should be determined in cases involving more than one defendant, this Court is asked to interpret the statute consistent with the policies and principles underlying the law of venue.

Proper venue generally is considered an important privilege which is given great weight. It is the general spirit and policy of many states' venue statutes to protect a defendant against being sued in a county arbitrarily selected by a plaintiff, wherein the defendant does not reside, or in which no part of the transaction occurred which gave rise to the cause of action. If a plaintiff could freely select the county to bring suit, obviously a defendant would be entirely at her mercy, since such an action could be made oppressive and unbearably costly.

Review of the Missouri general venue statute compels the conclusion that a higher priority is placed on protection of a Missouri defendant's right not to have to defend an action in a county where he has no reasonable expectation of being sued over that of a non-resident. Under the plain language of the statute, where one defendant is a resident and another is not, it is the resident's county of residence that determines venue. The nonresident must conform accordingly. Even if plaintiff brings the case where the cause of action accrued, the Missouri resident is still sued in a forum where he at least had some minimum contact. It has been held that the section "relating to resident and non-resident defendants clearly devolves a duty upon a plaintiff to bring his action in the county where the defendant resides." *Maxwell v. De Long*, 107 F.Supp. 166 (W.D.Mo. 1952).

If this Court adopts Respondent's construction of the statute, fixing venue as of the time the case is first filed, then a Missouri resident's venue rights become secondary wherever there is a non-Missouri resident defendant. For in such a case, plaintiff can always (as she did here) take advantage of the liberal amendment rules and re-file in the forum of her choice.

Such an outcome runs directly contrary to the express provisions of the statute, which state that where there is a resident and a non-resident defendant, suit shall be filed in the county where the resident resides. This case is a perfect example. Relator Giles is a Missouri resident. Yet because venue was fixed at the time Relator Linthicum (a non-resident) was sued, Giles must defend the action in a forum that is distant from his residence and where no part of the transaction forming the basis for the lawsuit transpired. The statute's intent is frustrated.

The parties do not dispute that the cause of action for personal injury in this case accrued in St. Francois county. Nor is it disputed that Relator Giles resides in Butler county, and Relator Linthicum in Arkansas. The proper venue for this lawsuit is either St. Francois county, pursuant to § 508.010**(6)**, or Butler county, pursuant to § 508.010**(3)**, since this case involves both a Missouri and a non-Missouri resident. Determining venue as the case currently stands (or after it was "brought" against Relator Giles), it is evident that venue in the City of St. Louis is improper. This interpretation of the statute is fair and reasonable, comports with the statute's intent to favor the venue rights of Missouri citizens over those of non-residents, and eliminates the particular type of forum shopping that has so obviously occurred in this case.

III. THE CURRENT LOOPHOLE IN MISSOURI VENUE LAW SHOULD BE ELIMINATED

The gamesmanship practiced in this case to obtain venue where it otherwise would not have existed is not limited to this case alone. Manipulation of the "first filing" loophole has become rather rampant. This practice is more manipulative than it appears at first blush. Frequently, on learning the identity of even the most tenuously connected, non-Missouri resident (such as Relator Linthicum, a carnival ride operator employed by Relator Giles from whom Plaintiff has no reasonable expectation of monetary recovery, and need not even be sued in order to recover from Relator Giles), plaintiffs seize the opportunity to file in the forum of their choice (*i.e.,* the City of St. Louis) by dismissing original actions pending in other counties where venue is proper and re-filing in that new forum. In numerous cases, plaintiffs amend their petitions, brazenly adding defendants

who would have initially defeated venue within time periods so short that not even the appearance of propriety is preserved. (In this case, one day). The defendants "added" are frequently those dismissed from the earlier actions. These practices are an affront to Missouri practice and procedure and should not be countenanced.

Recent cases filed in the City of St. Louis demonstrate this disturbing trend:

1. In ***Lund v. Rinaldi***, Cause no. 972-10054, Plaintiff filed its original petition on December 31, 1997, naming as sole Defendant Todd C. Rinaldi, a resident of Edwardsville, Illinois. The cause of action did not accrue in the City of St. Louis. **Two days later,** on or about January 2, 1998, Plaintiff added David E. Wagner, D.M.D., a St. Louis County resident, as a party defendant.

2. In ***Lind et al. v. Buser***, Cause No. 972-01338, Plaintiff filed its petition on April 30, 1997, naming as sole Defendant David Buser, a resident of Naples, Florida. The cause of action did not accrue in the City of St. Louis. **Five days later,** on or about May 5, 1997, Plaintiff added Dieterich OB Gyn Associates, Inc., a Missouri corporation with its principal place of business in St. Charles County, Anna Wolaniuk, a resident of St. Charles County, St. Louis Healthcare Network, a Missouri corporation with its principal place of business in St. Louis County and St. Johns Mercy Medical Center, a Missouri corporation with its principal place of business in St. Louis County, as party defendants.

3. In ***Borgfield v. Spargo***, Cause No. 962-08850, Plaintiff filed its petition on December 6, 1996, naming as sole defendant John M. Spargo, a resident of Henderson, North Carolina. The cause of action did not accrue in the City of St. Louis. **Six days later**, on or about December 12, 1996 Plaintiff

added Ramachandra Reddy, M.D., a resident of Cape Girardeau, Missouri, as a party defendant.

4. In ***Cooper v. Gerdt***, Cause No. 952-01205, Plaintiff filed its petition naming as sole defendant D. Gerdt, M.D., a resident of Murphysboro, Illinois. The cause of action did not accrue in the City of St. Louis. On May 2, 1995 Defendant Gerdt, M.D. removed the matter to the United States District Court, Eastern District of Missouri, based upon diversity of citizenship. On May 2, 1995, **a few hours** after Defendant's removal to federal court, Plaintiff forwarded the Court its First Amended Petition joining Shirley Jackson, R.N., a resident of Fredericktown, Missouri as an additional Defendant. The Federal Court granted joinder of Nurse Jackson as a party Defendant. Based upon joinder of a Missouri resident, the Federal Court remanded the matter to the Circuit Court of the City of St. Louis because diversity of citizenship no longer existed.

5. In ***Hammer v. Fireworks Spectacular, Inc., et al***., Cause No. 002-00598A, Plaintiff filed his Petition on March 3, 2000 in the City of St. Louis, naming as sole defendant Gary Cooke, a citizen and resident of the State of Illinois. **Less than three weeks later,** on March 22, 2000, Plaintiff added additional Defendants Fireworks Spectacular, Inc., David White, and Curtis Carron, as well a John Doe, City of Kirkwood employee. In that case, none of the defendants resided in the City of St. Louis, Missouri, and one of the defendants was an Illinois resident. The cause of action accrued in St. Louis County, Missouri. This case was appealed to the Missouri Court of Appeals for the Eastern District of Missouri, where a writ of mandamus was denied. This Honorable Court has granted a preliminary writ on the case and will entertain briefs and oral arguments.

As the above examples illustrate, blatant manipulation of the Missouri Rules of Civil Procedure in order to forum-shop as Plaintiff has done here is not unique to this case. Rather, it is a pervasive and escalating trend aimed at securing venue in the City of St. Louis. The legal loophole that permits this practice should be eliminated by determining venue according to the presence and status of the parties at the time the challenge to venue is being decided – or when the case is brought against a new defendant who challenges venue. Missouri courts should consider the status of the pleadings at the time venue is being determined . *See State ex rel. Breckenridge v. Sweeney* 920 S.W.2d 901 (Mo. 1996) (challenge of pretensive venue based on defective pleading should be determined when challenge is adjudicated and trial court should consider state of pleadings at that time).

IV. OTHER JURISDICTIONS SUPPORT RELATORS' POSITION

Relators' position comports with the general view in other jurisdictions which holds that the right to a change of venue depends on the conditions existing at the time the demand for the change is made, and that it must be determined by the conditions at the time the party claiming the right first appears in the action. 77 Am Jur 2d, United States §83. Examples of cases following this general rule include:

- ***Cliff v. Gleason***, 351 P.2d 394 (Colo. 1960) (holding the right to a change of venue depends on the conditions existing at the time the demand for the change is made, and must be determined at the time the party claiming the right first appears in the action; *citing* 92 C.J.S. Venue § 185a, p. 912).

- ***Worstell v. Porter Super. Ct.,*** 419 N.E.2d 127 (Ind. 1981) (interpreting a statute that provided requests for transfer of venue be made prior to setting of trial date, the Supreme court denied a writ of prohibition seeking to vacate a trial court's order granting change of venue. The court upheld "second generation" defendants' right to challenge venue even though the trial date had been set, since they were not parties to the action at the time trial was set.)
- ***State ex rel. Kennedy v. Hancock Cir. Ct.,*** 492 N.E.2d 26 (Ind. 1986) (upholding the trial court's grant of a transfer of venue to a "second generation" defendant even though that defendant was technically already a party to the action at the time trial date was set; defendant had been named in complaint, but not served with process, as of date trial was set.)
- ***Beckwith v. Satellite T.V. Center, Inc.,*** 699 N.E.2d 319 (Ind.App. 1998) (upholding the trial court's venue determination made based upon the status and presence of the parties in the action at the time the challenge to venue was decided – even though the motion for transfer of venue had been filed *before* an amended complaint was filed adding a new defendant. The appellate court stated: "In order to make its determination, the court had to consider all evidence and pleadings properly before it, *which included the amended complaint.*" (emphasis added) Since the presence of a new defendant affected the venue determination, the court took that into account in determining venue. The rule of law relied upon was that upon the filing of a motion challenging venue, the trial court must transfer the case to the county selected by the party

which first files such a motion if the court where the action was initially filed does not meet preferred venue requirements and the county selected by the party which filed the motion is a county of preferred venue. 699 N.E. 2d at 321.

- ***Schmidt v. Shearer,*** 995 P.2d 381 (Kan.App. 1999) (Upholding trial court's transfer of venue following the dismissal of a party on summary judgment where the only basis for venue in the transferor county had been the presence of that party in the action).
- ***Chesbrough v. State***, 465 S.W.2d 224 (Tex.Civ.App. 1971) (Holding that where a party is brought into a suit by amended petition, venue facts as to such new party are properly established as of the time the amended petition is filed).
- ***Kallen v. Serretto***, 14 P.2d 917 (Cal.App.1st Dist. 1932) (Holding that defendant parties existing at time motion challenging venue was made are the parties to be considered when determining venue).

Relators respectfully urge this Honorable Court to adopt the better practice of determining venue according to the status and presence of the parties at the time the challenge to venue is decided, or at the time the case is brought against the defendant making the challenge.

V. CONCLUSION

For all of the foregoing reasons, Relators submit that this Court should correct the abuses alluded to above by interpreting the general venue statute so that the propriety of venue is determined according to the presence and status of the parties at the time a

challenge to venue is decided. In this way, all defendants are afforded the right to challenge venue, not just the defendant originally named. Forum shopping of the kind evidenced in this case would be eliminated. Accordingly, Relators respectfully request that this Court make permanent its Preliminary Writ of Prohibition entered on April 19, 2001.

BY: _____

CHARLES H. COLE
Schuyler, Roche & Zwirner
One Prudential Plaza
130 E. Randolph Street
Suite 3800
Chicago, IL 60601
(312) 565-2400
(312) 565-8300 (fax)
One of the Attorneys for Relators

BY:_____

DOLORES AYALA
Schuyler, Roche & Zwirner
One Prudential Plaza
130 E. Randolph Street, Suite 3800
Chicago, IL 60601
(312) 565-2400
(312) 565-8300 (fax)
One of the Attorneys for Relators

BY: _____

BRENT J. BURTIN
Sandberg, Phoenix and vonGontard
1 City Center, 15th Floor
St. Louis, MO 63101
(314) 231-3332
(314) 241-7604 (fax)
One of the Attorneys for Relators

241116

CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

The undersigned certifies that this Relators' Brief complies with the limitations contained in special Rule No. 1(b), contains _____ words, and that the floppy disk filed with this Relators' Brief in accordance with Special Rule No. 1(f) has been scanned for viruses and is virus-free.

Charles H. Cole
Dolores Ayala
Schuyler, Roche & Zwirner, P.C.
130 East Randolph Street, Suite 3800
Chicago, Illinois 60601
(312) 565-2400

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of June, 2001, one copy of Relators' Brief and one copy of the disk required by Special Rule No. 1(f) were served upon each of the following via United States mail, correct postage prepaid:

The Honorable Michael B. Calvin, Judge
Circuit Court of the City of St. Louis
Civil Courts Building
10 North Tucker Boulevard
St. Louis, Missouri 63101
Respondent

John G. Simon, Esq.
Simon, Lowe & Passanante, L.L.C.
701 Market Street
Suite 390
St. Louis, Missouri 63101

Vincent H. Venker, II, Esq.
Baker, Sterchi, Cowden & Rice, L.L.C.
1010 Market Street
Suite 1610
St. Louis, MO 63101

Gerald T. Noce, Esq.
Noce and Buckley
515 Olive Street
St. Louis, Missouri 63101